(1)

Supreme Court, U.S.
FILED

OCT 9 2003

OFFICE OF THE CLERK

No. 03 539

In The

Supreme Court of the United States

WESTERN WIRELESS CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioners:

D. MICHAEL YOUNG *
SCOTT M. EDWARDS
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

STEVEN W. SANFORD
CADWELL SANFORD
DEIBERT & GARRY LLP
P.O. Box 1157
Sioux Falls, SD 57101-1157
(605) 336-0828

* Counsel of Record

79 pp

QUESTION PRESENTED

May a state constitutionally impose a use tax on services purchased and performed entirely outside the taxing state, solely on the ground that the services are an input to the purchaser's business (for which it has some in-state customers), as to which business the state imposes a separate sales tax.

PARTIES

Pursuant to Rule 14.1(b), the following list identifies all the parties to the proceeding in the Supreme Court of South Dakota, whose judgment is sought to be reviewed.

Appellant below: Western Wireless Corporation ("Western").[1] Pursuant to Rule 29.6, Western states that it has no parent corporation and no publicly held company owns 10% or more of Western's stock.

Respondent below: South Dakota Department of Revenue ("Department").

---

[1] Sioux Falls Cellular Communications Corp. was merged into Western Wireless Corporation in 1995.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

SOUTH DAKOTA'S TAX SCHEME 2

THE BILLING SERVICES AND THE TAX 3

PROCEDURAL HISTORY 4

REASONS FOR GRANTING THE PETITION 4

I. THIS CASE PRESENTS A CONSTITUTIONAL ISSUE OF SIGNIFICANT PUBLIC IMPORTANCE. 5

II. THE STATE COURT'S OPINION CONFLICTS WITH LIMITATIONS ON STATE TAXING POWER IN THE COURT'S DECISIONS 7

A. TAXES ON A DEEMED "BENEFICIAL USE" OF OUT-OF-STATE SERVICES ARE NOT VALID COMPENSATORY TAXES 8

B. A USE TAX ON INTANGIBLE BENEFITS FROM OUT-OF-STATE SERVICES EXPOSES INTERSTATE BUSINESS TO A RISK OF MULTIPLE TAXATION EXPRESSLY PROHIBITED BY THE COURT'S DECISIONS 10

C. SOUTH DAKOTA'S TAXATION OF SERVICES PERFORMED ENTIRELY OUTSIDE THE STATE IS EXTRATERRITORIAL TAXATION, PROHIBITED BY THE COURT'S DECISIONS 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) 8, 12, 13

Armco Inc. v. Hardesty, 467 U.S. 638 (1984) 9

ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) 7

Associated Indus. of Mo. v. Lohman, 511 U.S. 641 (1994) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 7

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 7, 8, 10

Goldberg v. Sweet, 488 U.S. 252 (1989) 7, 10, 11

Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 8, 9

Hughes v. Oklahoma, 441 U.S. 322 (1979) 8

In re Thermoset Plastics, Inc., 473 N.W.2d 136 (S.D. 1991) 14

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 7, 10, 11, 12

Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93 (1994) 8, 9,10

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 13

Tyler Pipe Indus., Inc. v. Department of Revenue, 483 U.S. 232 (1987) 8

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 13

Constitution

U.S. Const. art. I, § 8, cl. 3 1

Statutes

28 U.S.C. § 1257(a) 1

S.D. Codified Laws § 10-45-4 2

S.D. Codified Laws § 10-45-6.1 3

S.D. Codified Laws § 10-45-12.3 2

S.D. Codified Laws § 10-46-2 2

S.D. Codified Laws § 10-46-2.1 ..... 2, 3

Other Authorities

BNA, Inc., *Daily Tax Report* No. 164 (Aug. 25, 2003) 7

CCH, Inc., *U.S. Master Sales and Use Tax Guide* (2002) 6

Federation of Tax Administrators, Research Report No. 147, *Sales Taxation of Services*, 1996 Update (Apr. 1997) 5, 6

H 1020, §§ D-3 and D-8, 121st Maine Leg., Reg. Sess. (Me. 2003) 6

SJR 1, § 8, 2003 Reg. Leg. Sess. 78 (Tex. 2003) 6

Walter Hellerstein *et al.*, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L. Rev. 47 (1995) 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Western respectfully requests the Court to issue a Writ of Certiorari to review the opinion of the Supreme Court of South Dakota in this case. While the Court has addressed the application of Commerce Clause principles to a variety of taxes,[2] it has not yet considered their application to a newer and increasingly important form of tax –use tax imposed on services– and the state court's erroneous application of those principles warrants the Court's review at this time.

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota, reported at 665 N.W.2d 73, is set forth in Appendix A at 1a to 18a. The Memorandum Decision and Judgment of the South Dakota Circuit Court are set forth in Appendices B and C, respectively, at 19a to 36a. The Amended Proposed Decision of the Hearing Examiner and the Secretary of Revenue's Final Decision adopting same are set forth in Appendices D and E, respectively, at 37a to 50a. The order of the Supreme Court of South Dakota denying reconsideration is set forth in Appendix F at 51a.

JURISDICTION

The Supreme Court of South Dakota issued its opinion on June 4, 2003, and denied Western's Petition for Rehearing on July 11, 2003. The Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the Constitution of the United States (art. I, § 8, cl. 3) is set forth in Appendix G, along with the pertinent provisions of the South Dakota Codified Laws at 52a to 54a.

---

[2] *See* note 9, *infra*.

STATEMENT OF THE CASE

This petition seeks review of a state court decision upholding a tax imposed on a deemed "use" of services performed entirely outside the taxing state. Whether a facially discriminatory use tax (on services performed *outside* the taxing state) can be justified as compensating for a sales tax on services performed in the state is an important constitutional question the Court has not addressed. The extraterritorial imposition of use tax on services performed out of state is an important and increasingly frequent issue that exposes interstate commerce to significant risks of multiple taxation. If left uncorrected, this case sets a precedent for excessive multiple and discriminatory taxation among the numerous states expanding their sales and use taxes to ever more services.

South Dakota's Tax Scheme

Like an increasing number of states, South Dakota imposes sales and use taxes on the sale/use of many services (in addition to the traditional imposition of tax on the sale/use of tangible personal property).

Services performed in South Dakota are subject to sales tax, unless the service is "used *entirely* outside the state." S.D. Codified Laws § 10-45-4 and § 10-45-12.3 (emphasis added). Services performed outside South Dakota are subjected to South Dakota's use tax when the service is deemed to be "used" in the state. S.D. Codified Laws § 10-46-2.1.[3] No act by the taxpayer in South Dakota is necessary

---

[3] South Dakota separately imposes use tax on the use of tangible property in South Dakota. S.D. Codified Laws § 10-46-2. Although Western's billing service provider mailed bills from California to addresses in many states the Department and the state courts emphasized that Western was *not* taxed on any purported use of the bills (as tangible property) in South Dakota. Rather Western was taxed on a deemed "use" of the billing *services*. *See* App. 6a-7a, 25a-26a, and 46a ("the services of CSC, which are utilized by Western are subject to use tax").

to constitute "use" of the service and trigger the use tax. The measure of the tax is the "*value* of the services at the time they are rendered." *Id.* (emphasis added).

The Billing Services and the Tax

Western's principal place of business is in suburban Seattle. Western provides cellular telephone service in a number of states, including South Dakota. As part of its cellular telephone business, Western has contracted with Computer Sciences Corporation ("CSC") for CSC to prepare and mail subscriber telephone bills from raw call data.

In Illinois, CSC takes raw call data provided by Western and converts the data into electronic telephone bills, a process referred to as "call rating."[4] CSC then transmits the bill images electronically from Illinois to a printer in California, where paper copies of the bills are printed and deposited in the U.S. mail to Western's subscribers (including those in South Dakota).

Western's customers remit payment to Phoenix. Billing questions are fielded by call centers located in Washington and New Mexico.

Western pays sales tax on the cellular telephone services it provides to South Dakota subscribers. S.D. Codified Laws § 10-45-6.1.[5] In addition to that tax, South Dakota has imposed use tax against Western on billing services performed by CSC in Illinois and California.

---

[4] Western, at its offices in Washington State, reviews the electronic bills on a sampling basis.

[5] Western's cellular telephone business is also subject to numerous other taxes, including a state gross receipts tax, a state TRS surcharge and County E911 taxes.

Procedural History

Western challenged the tax assessment administratively, and the Department concluded that for use tax purposes "the beneficial use of every unit of billing information is in the state where the customer resides." App. 46a.

Western appealed the administrative decision to the Circuit Court, arguing that the out-of-state services were not subject to use tax and that imposition of use tax on out-of-state services violates the Commerce Clause. The trial court rejected Western's constitutional claims and affirmed the assessment, concluding that Western is deemed to "use" the services everywhere Western conducts its (separately taxable) business. In so holding, the court expressly distinguished between use taxes on tangible goods and use taxes on services, acknowledging that a use tax on goods requires that "a taxpayer must have some right or power incident to ownership of tangible personal property before such property is taxable." App. 26a. The court expressly rejected that requirement for imposing use tax on services: "the absence of that element of right or power is of no consequence in this case because that requirement is not necessary for the use taxation of *services*." *Id.*

In a 3-2 decision, the Supreme Court of South Dakota affirmed the Circuit Court's decision, and it denied Western's motion for reconsideration on July 11, 2003.

REASONS FOR GRANTING THE PETITION

The imposition of use taxes on out-of-state services presents a constitutional issue that the Court has not directly addressed, and it is important that the Court do so. Because the decision below conflicts with the Court's decisions addressing Commerce Clause restraints on state taxing powers, it is important that the Court address this form of tax in this case. Rule 10(c). This case presents a constitutional question affecting the validity of an increasingly widespread form of state taxation. The state court's decision establishes

a far-reaching precedent for other states to impose similar taxes on a deemed "use" of services performed out of state, thereby extending their taxing power to activities conducted outside their borders and subjecting taxpayers to significant risks of multiple taxation.

I. THIS CASE PRESENTS A CONSTITUTIONAL ISSUE OF SIGNIFICANT PUBLIC IMPORTANCE.

The impact of the decision below, and the potential economic harm resulting from states' taxing services performed in other states, is national in scope. The Federation of Tax Administrators ("FTA")[6] has undertaken several surveys examining the expanding trend toward state taxation of services, a trend it notes is driven by the "inexorable shift in consumer expenditures from the purchase of goods to the purchase of services." The FTA reports that between 1990 and 1992, 28 states expanded their sales taxes to cover more business services. From 1992 through 1996, ten states (including some of the earlier 28) made further expansions to cover additional business services. As the FTA concluded:

> Imposing sales tax on services will undoubtedly continue to be one of the most discussed topics in state tax policy in the coming years. As states try to arrest the erosion of the traditional sales tax base and meet increased demands, they will, by necessity, examine the taxation of the service sector.

FTA Research Report No. 147, Sales Taxation of Services, 1996 Update at 11 (Apr. 1997).

---

[6] The FTA is the professional organization of state officials who administer tax laws.

Twenty states already impose sales and use taxes on a wide array of services.[7] So far 14 states (some not included above) impose sales and use taxes on information or data processing services like those at issue here.[8] Altogether, at least 34 of the 46 states that impose sales and use taxes now tax at least some types of business services. FTA Research Report No. 147 (Table 1). The increasing imposition of sales and use taxes on services has also been recognized by tax scholars. *See* Walter Hellerstein *et al.*, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L. Rev. 47, 103-04 (1995).

Texas, Maine and Virginia reflect the trend of expanding sales and use taxation of services. A resolution was recently introduced in the Texas Senate to amend the state's constitution to broaden that state's sales and use tax base. The resolution provides in relevant part that "[t]he state shall impose the [sales and use] tax described by Subsection (a) of this section on the sale or use of *all* services unless the legislature by general law provides exemptions from the application of the tax." SJR 1, § 8, 2003 Reg. Leg. Sess. 78 (Tex. 2003) (emphasis added). Similarly, a bill was introduced this year in Maine's House of Representatives that would radically expand Maine's definition of retail sales to include most major business, personal and licensed services. H 1020, §§ D-3 and D-8, 121st Maine Leg., Reg. Sess. (Me. 2003). In August, the Virginia Special Assembly's special commission on tax reform recommended

---

[7] CCH, Inc., *U.S. Master Sales and Use Tax Guide* ¶ 126 (2002), identifies the sales and use taxation of services in the following 20 states as either "generally taxable" or "many taxable": Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Kansas, Maine, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia and Wisconsin.

[8] Connecticut, Delaware, Florida, Hawaii, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Washington and West Virginia. FTA Research Report No. 147, at 10.

legislation that would expand that state's sales and use taxes to "a wide range of services covering everything from auto repair to legal fees." BNA, Inc., *Daily Tax Report* No. 164 at H-1 (Aug. 25, 2003).

If left unaddressed, the decision below will be precedent encouraging other states to impose use taxes on out-of-state services. The Court should grant certiorari in this case to clarify for all states how Commerce Clause limitations on state taxing power apply to the imposition of use tax on services. *See Goldberg v. Sweet*, 488 U.S. 252 (1989) (certiorari granted to address Commerce Clause limitations on sales taxation of interstate telephone service in light of the proliferation of such taxes following deregulation).

II. THE STATE COURT'S OPINION CONFLICTS WITH LIMITATIONS ON STATE TAXING POWER IN THE COURT'S DECISIONS.

The hallmark of the Court's modern Commerce Clause jurisprudence has been an emphasis on the "practical effect" of a tax, rather than the "formal language of the tax statute." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In its emphasis on the practical effect of state taxes, the Court has focused on two related vices: (1) preventing taxation of extraterritorial activities, *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982) (a state "may not tax value earned outside its borders"), and (2) protecting against the threat of multiple taxation, *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 182 (1995). These two practical concerns are the foundation of "what has come to be known as *Complete Auto's* four-part test." *Id.* at 183.

The Court has addressed the application of these principles to a variety of taxes,[9] but it has not yet considered

---

[9] For example, *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (franchise tax on stocks); *Jefferson Lines*, 514 U.S. 517 (sales taxation of services);

their application to use taxes imposed on services, an area of rapidly increasing importance.

A. Taxes on a Deemed "Beneficial Use" of Out-of-State Services Are Not Valid Compensatory Taxes.

As the Court has noted, use taxes are by nature facially discriminatory, because they effectively apply only to out-of-state purchases. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 332 (1996) (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)). Under the Commerce Clause, facially discriminatory taxes are "virtually per se invalid." *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Thus, the Court's "cases require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.'" *Id.* at 101 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

In this context, "a facially discriminatory tax may still survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed to simply make interstate commerce bear a burden already borne by intrastate commerce." *Fulton*, 516 U.S. at 329 (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)). Use taxes, when imposed on tangible property that is physically present in a state, have been upheld as valid compensatory taxes, provided that "the combined effect of the sales and use taxes was to subject intrastate and interstate commerce to equivalent burdens." *Fulton*, 516 U.S. at 332. *The Court has never addressed the potential expansion of the compensatory tax doctrine to use taxes imposed on out-of-state services.* Like the taxes the Court invalidated in *Fulton* and *Oregon Waste*, and contrary to the view of the court below, South Dakota's tax does not meet the requirements of the Court's compensatory tax doctrine.

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992) (net income tax on dividends); and *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) (gross receipts tax on sales of goods).

First, the Court has recognized that sales and use taxes *on tangible property* are taxes on "substantially equivalent events," reasoning that:

> The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. ... A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively ... [which] has no greater or different effect upon that commerce than a general property tax.

Silas Mason, 300 U.S. at 582 (citations omitted). There is no similar property right on which to ground a use tax on services performed outside the state but assumed to be "used" in every state where the taxpayer's multistate business extends (especially when, as in this case, the taxpayer's business is already subject to a sales tax, the absence of which is the only justification for the use tax). By analogy, Western owns telephone switches in states outside South Dakota that transmit calls made by South Dakota subscribers, yet does not exercise any property rights over those switches in South Dakota; that state cannot impose use tax on switches that never enter the state merely because they are components of an interstate business conducted in part with South Dakota customers.

Put another way, any deemed benefit to Western's telephone business in South Dakota is not "sufficiently similar in substance to serve as [a] mutually exclusive 'prox[y]'" for CSC's data processing and printing activities performed in Illinois and California. *Oregon Waste*, 511 U.S. at 103 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)). As the Court has emphasized "our more recent cases have shown extreme reluctance to recognize new compensatory categories. In *Oregon Waste* we even pointed out that 'use taxes on *products* purchased out of state are the *only* taxes we have upheld in recent memory under the

compensatory tax doctrine.'" *Fulton*, 516 U.S. at 338 (quoting *Oregon Waste*, 511 U.S. at 105) (emphasis added).

B. A Use Tax on Intangible Benefits From Out-of-State Services Exposes Interstate Business to a Risk of Multiple Taxation Expressly Prohibited by the Court's Decisions.

The Court has instructed that an impermissible threat of multiple taxation exists

> whenever one State's act of *overreaching* combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it.

Jefferson Lines, 514 U.S. at 184-85 (emphasis added). The tax in this case suffers from that vice. South Dakota has overreached state boundaries by imposing tax on the value of services performed in Illinois and California.[10]

In *Jefferson Lines*, the Court addressed a Commerce Clause challenge to sales tax on bus tickets purchased in the state for outbound interstate travel. The Court explained that it has upheld taxes on sales of *goods* against Commerce Clause challenges because a "sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of *the place of sale*." 514 U.S. at 186 (emphasis added). Thus, there is "a sufficient safeguard against the risk of multiple taxation of a sale in the fact that it was consummated in only one State." *Id.* at 187. Consequently, "a sales tax on coal, for example, could not be repeated by

---

[10] The Court has decried such overreaching as a violation of *Complete Auto*'s fair apportionment requirement. *Id.* at 184. It also violates *Complete Auto's* substantial nexus requirement. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

other States, for the same coal was not imagined ever to be delivered in two States at once." *Id.*

The Court concluded in *Jefferson Lines* that a "sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery." *Id.* at 188. The Court then found that Oklahoma had a unique relationship to service being taxed:

> The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination.

Id. at 190. In *Goldberg*, the Court applied the same analysis to a sales tax on landline telephone services that originated or terminated in the state. By limiting the tax to calls that (1) originate or terminate in the state and (2) are charged or billed to a location in the state, the tax was imposed only on *activities conducted within the state* and avoided a risk of multiple taxation. 488 U.S. at 262-63 (call's origination and termination points defined the "only two States [that] have a nexus substantial enough to tax" the service).

Applying the Court's *Jefferson/Goldberg* standard to the South Dakota tax on billing services spotlights the prohibited threat of multiple taxation. *Goldberg* and *Jefferson Lines* identified two characteristics that protected the taxpayers in those cases from the threat of multiple taxation. First, a key part of the taxed service was performed in the taxing state (where the bus trip or phone call either originated or terminated). Second, the taxed service was either paid for in the taxing state or billed to the taxpayer's location there. These protections are not present in South Dakota's scheme for taxing a deemed "use" of services performed entirely outside the state.

Contrary to the tax on phone service in *Goldberg*, or the phone services on which Western already pays South Dakota sales tax, or the bus service in *Jefferson Lines*, no part of CSC's billing service was performed in South Dakota, nor was CSC's service billed to or paid for in South Dakota. CSC bills Western for that service at Western's corporate headquarters in Washington State, the same state where Western pays for the service.

Unlike *Goldberg* and *Jefferson Lines* (where the significant local activities precluded any other state from taxing the same transaction), Illinois and California clearly have the power to tax CSC's performance of these services in their states. *See Jefferson Lines*, 514 U.S. at 188 ("we have held that the entire gross receipts derived from sales of services to be performed wholly in one state are taxable by that State").

C. South Dakota's Taxation of Services Performed Entirely Outside the State Is Extraterritorial Taxation, Prohibited by the Court's Decisions.

Taxation of a deemed "use" in one state of intangible benefits from a service actually performed in another state has the practical economic effect of allowing state taxation of extraterritorial activity. The Commerce Clause prohibition against taxing value earned from activities conducted outside a state's borders "focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax" –in particular on "the basic principle that the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on *those activities*." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992) (emphasis added)

(quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).[11]

As discussed above, South Dakota already taxes the cellular phone services Western provides in South Dakota, for which the state undisputedly provides protection and benefit. South Dakota, however, does not confer any protections or benefits to the activities of CSC in performing billing services for Western in Illinois and California; thus there is no justification for South Dakota to impose tax on those extraterritorial activities.

CSC does not perform any part of its billing services in South Dakota; those services begin with call rating in Illinois and end with bill printing and mailing in California. South Dakota has taxed surreptitiously that which it is prohibited from taxing directly.

Simply put, the state has taxed services performed entirely outside its boundaries by labeling the tax as one on "use" and then "deeming" the service to be "used" in South Dakota, where Western performs a separately taxed activity (providing cellular phone service). Permitting South Dakota to accomplish by stealth and labels that which it is forbidden to do directly would resurrect the formalism the Court expressly rejected in *Complete Auto Transit*.

---

[11] The prohibition is grounded both in "the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax," *id.* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992)), as well as concern for the risk of multiple taxation that would result from "overreaching" and taxing extraterritorial activities:

> In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subject to severe multiple taxation.

Id. at 777-78.

While apparent on its face, the extraterritorial nature of the tax may also be illustrated by hypothetical examples:

1. Assume that Western did not outsource the billing function and instead purchased a computer it installed in Illinois and a printing press it installed in California to do the billing (the same billing services Western purchased from CSC). It is beyond question that South Dakota could not impose use tax on the computer and printing press because Western never used the property in South Dakota.

2. Similarly Western owns switching equipment in various states that it uses to provide its interstate cellular phone service. South Dakota can impose sales or use tax on the two switches actually located in that state, but not on switches located in other states, even if they are used in providing phone service to its South Dakota customers.

3. A company doing business in multiple states hires a law firm in Chicago to provide legal advice. The advice relates broadly to the company's overall operations and therefore its business in every state. Under South Dakota's scheme the service is subject to South Dakota tax to whatever extent South Dakota deems the legal services used there.

These hypotheticals are not purely theoretical, the breadth of South Dakota's use tax on out-of-state services is virtually limitless. The state court affirmed the application of use tax on the deemed "use" in South Dakota of accounting services performed in Arizona. *In re Thermoset Plastics, Inc.*, 473 N.W.2d 136 (S.D. 1991). In *Thermoset*, South Dakota imposed use tax on accounting fees a start-up business paid for accounting services performed in Arizona. Those services involved creating a projection of potential cash flows for "a different product line, different manufacturing equipment, and a different labor structure than what later materialized in South Dakota." *Id.* at 137. Moreover, the services were performed when the company "had not yet determined that it would locate in South Dakota." *Id.*

The Court has not yet considered the application of its Commerce Clause principles to use taxes imposed on services performed outside the taxing state, a widespread and increasingly popular form of state taxation. The state court's decision, approving the tax, conflicts with the guiding principles in the Court's cases establishing limitations on state taxing power, including (a) the requirements for justifying facially discriminatory taxes as compensatory; (b) the prohibition against taxes that expose interstate businesses to the risk of multiple taxation; and (c) the prohibition against taxing value created outside a state's borders. Both the states and business will benefit from the Court's clarification of the constitutional scope of the states' power to impose use tax on services performed outside their boundaries.

CONCLUSION

For the reasons set forth above, Western respectfully requests that the Court grant certiorari to review the Supreme Court of South Dakota's decision.

Respectfully submitted,

D. MICHAEL YOUNG*
SCOTT M. EDWARDS
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000

STEVEN W. SANFORD
CADWELL SANFORD
DEIBERT & GARRY LLP
P.O. Box 1157
Sioux Falls, SD 57101-1157
(605) 336-0828

Counsel for Petitioners
* Counsel of Record

October 9, 2003